

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID CHESTER MARSH,

Defendant-Appellant.

UNPUBLISHED

February 2, 2010

No. 286967

Isabella Circuit Court

LC No. 07-002086-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of obtaining money (more than \$1,000 but less than \$20,000) by false pretenses, MCL 750.218(4)(a). Defendant was sentenced to three years probation with the first five months served in Isabella County Jail. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that amendment of the information to specify that the date of the offense was “between April 9, and August 31, 2007” resulted in his being convicted on insufficient evidence. Specifically, he argues that while there was evidence of fraud on April 9, 2007, there was no evidence of continuing violations in the subsequent timeframe. Thus, he asserts, his conviction is constitutionally deficient. We disagree. When reviewing a sufficiency challenge, “evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury’s finding that the defendant was guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

The crime of obtaining money by false pretenses requires (1) a false representation as to an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the false representation with an intent to deceive, and (4) detrimental reliance by the victim on the false representation. MCL 750.218; *People v Webbs*, 263 Mich App 531, 532 n 1; 689 NW2d 163 (2004). A basic principal of criminal law is that no crime is committed unless the mental and physical elements of the crime occur together. For the crime of obtaining money by false pretenses, this generally means that the knowledge of the falsity of the statement and the intent to defraud must coincide with the obtaining of the title to the property. See LaFave, *Criminal Law* (Hornbook Series, 1972), p 668. At trial, defendant contended that he did not intend to defraud Richardson when he entered into the agreement with her. Specifically, defendant argued that while he may have “bit off more than he could chew” and “maybe thought he could accomplish

things that he couldn't accomplish," he nonetheless did not have the intent to defraud when the agreement was entered into.

The prosecution presented sufficient evidence to establish all elements of this crime. In this case, Richardson testified that she hired defendant to move the house for \$16,500. She testified that after defendant signed the contract and collected a deposit of \$8,250 from her, he did nothing to fulfill his obligation under the contract. Additionally, other acts witnesses testified that defendant engaged in similar behavior in the past. Based on this evidence, a rational jury could find: (1) that defendant falsely represented to Richardson, by written contract, that he would move her house for \$16,500; (2) that defendant knew that his representation that he would move Richardson's house was false, based on defendant's failure to even attempt to fulfill his obligation under the contract; (3) that, given the evidence establishing the use of a common scheme to defraud, defendant intended to deceive Richardson into believing that he would move her house;¹ and (4) that Richardson relied on defendant's false representation that he would move her house.

Although there was considerable evidence that defendant continued to misrepresent his intention to perform the contract, the only evidence presented as to detrimental reliance indicated that defendant took money from Richardson only on one day, April 9, 2007. Defendant admits that the evidence shows that he violated the law on that date. Given that there was sufficient evidence to support that defendant committed the offense on April 9, 2007, any error in the amendment of the information or the instruction of the jury was harmless. MCL 769.26; MCR 2.613(A); see *People v Breckenridge*, 81 Mich App 6, 10-11; 263 NW2d 922 (1978) (no error to amend information to conform to the proofs because time is not the essence of the offense).

Defendant next argues that the trial court impermissibly allowed "other acts" evidence in violation of MRE 404(b). MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. However, under MRE 404(b)(1), evidence of prior bad acts is admissible if (1) the evidence is offered for a purpose other than to prove propensity, (2) is relevant under MRE 402, and (3) its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Here, the testimony of the other acts witnesses was offered to show that defendant employed a common scheme or plan when committing the charged crime, and to show that defendant had the intent to defraud Richardson. Both are proper purposes under MRE 404(b)(1). Further, the relevance of the other acts evidence was established by the degree of similarity between it and the circumstances of the instant offense. See *Sabin, supra* at 66-67. In each

¹ Given the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient to prove an actor's purpose. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

circumstance, defendant signed a contract, collected an up-front deposit, failed to acquire required permits and make necessary preparations, and then failed to complete the contract or to repay the deposit. The other acts evidence also showed that when the homeowners attempted to contact defendant about the status of the job, he would stop returning their phone calls. These circumstances mirrored those of the present crime.

Defendant also argues that the testimony of the other acts witnesses had no tendency to prove that defendant intended to defraud Richardson because she waited only a week after the August 20, 2007 deadline before concluding that defendant did not intend to honor his contract. This argument is merely an attempt by defendant to reassert that he lacked the requisite intent to defraud when entering into the agreement with Richardson. In essence, defendant is arguing that had he been given more time, he would have honored the contract, thereby establishing that he did not act with the intent to defraud. This argument actually supports introduction of the other acts evidence for the purpose of showing intent. If defendant's intent is at issue, then evidence that he had acted consistently in the past has a tendency to reveal the intent with which he acted in the present case. "When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 23. Here, as stated above, the uncharged offenses were more than in the "same general category," they were almost identical to the charged offense.

Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the evidence was significantly probative of defendant's intent, which was the principal issue at trial. Furthermore, the trial court clearly instructed the jury on the proper use of this evidence. Jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Thus, there was no plain error in admitting this evidence.

Because the trial court correctly admitted the other acts evidence, defense counsel was not ineffective for failing to lodge a meritless objection to its admissibility. Counsel is not ineffective for failing to make a futile objection. *McGhee, supra* at 627.

Defendant's final argument is that the sentencing court abused its discretion in ordering defendant to pay \$6,086.40 to Richardson as compensation for lost wages because any lost wages were unrelated to defendant's conduct. This Court reviews a sentencing court's order of restitution for an abuse of discretion and its findings for clear error. *People v Guajardo*, 213 Mich App 198, 201-202; 539 NW2d 570 (1995). An abuse of discretion occurs "when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The court's reasoning for awarding the \$6,086.40 as part of its restitution order is somewhat unclear. Based on one exchange with Richardson, it could be argued that the court awarded restitution based on the premise that defendant caused her emotional stress, which in turn caused her to have a bus accident that resulted in her dismissal and the attendant lost wages. Then, later in sentencing the trial court stated the following:

I—I'm just trying to make the record clear that some of these things, and I think I adequately pointed when I was looking at emotional distress, but I can't tie the accident with ICTC-with the ICTC bus-the ICTC bus to this. I mean, that's a bit of a stretch. So, what I've done is, use my observations at trial, here today and she's clearly emotionally distressed by this and it's disturbed her in ways and I articulated some of those damages she's incurred are emotional, and emotional injury related.

This statement supports the conclusion that the court was awarding the damages for emotional distress, and not for lost wages.

Although the court could have been clearer on this issue, the court's own statement of clarification indicates that it awarded \$6,086.40 for Richardson's emotional harm, not her lost wages. Under MCL 780.766(1) a "victim" is "an individual who suffers direct or threatened physical, financial, or *emotional* harm as a result of the commission of a crime." MCL 780.766(1) (emphasis added). Here, the trial court found that Richardson suffered an emotional harm as a direct result of defendant's criminal conduct. The court based this determination on its observations at trial and at sentencing, opining that Richardson was clearly emotionally distressed by defendant's criminal conduct. Accordingly, the sentencing court did not abuse its discretion in awarding restitution for emotional harm.

We affirm.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello